

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAUREN DALE OMELAY,

Defendant-Appellant.

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UNPUBLISHED

April 22, 2014

No. 314032

Calhoun Circuit Court

LC No. 12-001683-FC

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant Lauren Dale Omelay appeals of right his jury conviction of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 20 to 40 years' imprisonment for the second-degree murder conviction and to two years' imprisonment for the felony-firearm conviction, to be served consecutively. We affirm.

**I. FACTS**

The instant case arises from a property dispute between defendant and the victim, which ultimately resulted in the shooting death of the victim. Defendant lived on the subject property his entire life, and at one time he and his brother owned the property as tenants in common. Subsequently, defendant's brother sold his interest in the property to the victim. Thereafter, defendant and the victim could not come to an agreement as to the division of the land. The parties quarreled over the property for several years before the victim eventually filed a lawsuit to force partition of the property. A settlement was reached, which provided for a survey to set the boundary lines of the property. The survey was never completed. On March 31, 2012, the victim was expected at the home of defendant's brother but never arrived. His body was discovered the next day near the side of a road in Branch County, south of defendant's home. An autopsy revealed that the victim sustained five gunshot wounds, including one to his back.

In the field behind defendant's home, investigators discovered the victim's cellular telephone, empty bullet casings, and a fired bullet. Inside defendant's home, investigators found a .17-caliber rifle, which was later matched to the casings and the bullet found in the field. When investigators located and searched the victim's pickup truck, they found a measuring wheel in the rear seat containing blood that belonged to the victim. Defendant subsequently admitted his involvement in the victim's death.

At trial, defendant claimed that he shot the victim in self-defense during a physical altercation in which the victim hit defendant with a measuring wheel and then pinned defendant against his pickup truck while kneeling him in the stomach and groin area. Defendant claimed that he feared for his life and that while he was pinned against the truck he reached for his rifle—which he claimed he kept in the truck for shooting animals—in order to fight off the victim. After hitting the victim with the rifle proved fruitless, defendant shot the victim, but he claimed he could not recall shooting five times. According to defendant, after the victim was dead he loaded the victim’s body into his pickup truck, dumped him near the side of a road, and returned home. The next day defendant returned the victim’s pickup truck to the victim’s home. Defendant was thereafter charged and convicted as previously recounted.

## II. ANALYSIS

Defendant first argues that he was denied a fair trial when the trial court refused to grant two different requests to adjourn trial. A trial court has discretion to grant an adjournment if the request is based on good cause. MCR 2.503(B)(1); MCL 768.2; *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). In determining whether a party has shown good cause, a trial court should consider whether defendant “(1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.” *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003) (quotation marks and citation omitted). A trial court’s ruling on a party’s request for adjournment is reviewed for an abuse of discretion. *Id.* at 17. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). A trial court’s erroneous decision to deny a defendant’s motion to adjourn is not grounds for reversal unless the defendant demonstrates prejudice. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000).

Defendant’s first request for adjournment, made on the first day of trial, was based on his counsel having had insufficient time to prepare because of his involvement with another trial, and that the prosecution failed to provide defendant with its witness list until 28 days before trial, in violation of MCL 767.40a(3) (requiring it be provided not less than 30 days before trial). In denying this request, the trial court reasoned that defense counsel had been a part of the case for several months, including during defendant’s preliminary examination, and had been on notice of the trial date for several months. Additionally, the trial court noted that a previous request for adjournment based on defense counsel’s scheduling conflict had been heard and the court ruled that this case would not start until counsel’s other trial was over. There had been no objection to that ruling. As to the untimely witness list, the trial court noted that the prosecution was close to the 30-day requirement, but nonetheless ruled that the prosecution would not be allowed to present any witnesses contained on the witness list which defendant was not already aware of through previous reports. Under these facts we hold that the trial court did not abuse its discretion in rejecting defendant’s request for adjournment, and in any event, defendant failed to establish any prejudice resulting from that ruling.

Defendant’s second request for adjournment, made on the second day of trial, was based on his having received new evidence that day from the prosecution. In denying this request, the trial court ruled that any new witnesses derived from the new evidence would not be allowed to testify until defense counsel had an opportunity to meet with them. Additionally, the trial court

ruled that to the extent that the new evidence provided a basis for further cross-examination of any other witnesses, the prosecution would be required to recall those witnesses. Again, the trial court did not abuse its discretion in rejecting this request for adjournment. Although defendant had good cause for requesting the adjournment, defendant failed to demonstrate prejudice resulting from that ruling. This is particularly so because the trial court eliminated any potential prejudice through its remedial ruling.

Defendant next argues that his privilege against self-incrimination was violated when he made incriminating statements to police while in custody but before being given his *Miranda*<sup>1</sup> warnings, and that his counsel was ineffective for failing to object to the admission of those statements. Defendant did not move for a pre-trial suppression hearing or otherwise object to the admission of his statements at trial, and therefore, this evidentiary issue is unpreserved. *People v Gentner, Inc*, 262 Mich App 363, 368-369; 686 NW2d 752 (2004). We review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant also failed to move for a new trial or for a *Ginther*<sup>2</sup> hearing regarding his claim of ineffective assistance of counsel, and therefore, our review of that claim is limited to errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

A criminal defendant has a right against self-incrimination. *People v White*, 493 Mich 187, 193-194; 828 NW2d 329 (2013). In order to protect that right, “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards[.]” *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). However, a suspect need not be given *Miranda* warnings unless the questioning done by police officers amounts to a “custodial interrogation.” *People v Steele*, 292 Mich App 308, 316; 806 NW2d 753 (2011); *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). “Generally, a custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his or her freedom of action in any significant way.” *Steele*, 292 Mich App at 316. To determine whether a defendant was in custody at the time of the interrogation, this Court considers the totality of the circumstances surrounding the questioning, “with the key question being whether the accused reasonably could have believed that [s]he was not free to leave.” *Coomer*, 245 Mich App at 219 (quotation marks and citation omitted). The inquiry is objective, focusing on whether a reasonable person would feel free to leave, not whether the suspect subjectively believed he could have left. *Id.* at 220.

On this record, we conclude that defendant was not “in custody” at the time he made statements to police, such that *Miranda* warnings were required. Police officers arrived at defendant's home and asked him to accompany them to the police station for questioning. Defendant voluntarily agreed. Defendant rode in the front seat of the patrol car to the station, and the investigators testified that defendant was not under arrest at the time he accompanied

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

them to the station. Defendant makes no assertion to the contrary on appeal. The record also does not indicate, and defendant does not assert, that he was ever handcuffed or otherwise restrained during the interview. Given the totality of the circumstances, we conclude that defendant was not “deprived of his . . . freedom of action in any significant way[.]” *Steele*, 292 Mich App at 316, and could not have reasonably believed that he was “not free to leave.” *Coomer*, 245 Mich App at 219 (quotation marks and citation omitted). Because defendant was not in custody, no *Miranda* warnings were required and defendant’s statements were admissible.

Our conclusion necessarily precludes defendant from prevailing on his claim of ineffective assistance of counsel. To prevail on such a claim a defendant must establish both (1) that his defense counsel’s performance was objectively deficient and (2) that the deficient performance prejudiced his defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). However, defense counsel is not deficient for failing to object to admissible evidence. *Unger*, 278 Mich App at 257. See also *Snider*, 239 Mich App at 425 (defense counsel not required to make a meritless objection).

Defendant next argues that he was denied a fair trial where the prosecution misstated the testimony of a witness during closing argument. Defendant failed to preserve this issue by making a timely, contemporaneous objection and request for a curative instruction, and therefore, we review the issue for plain error affecting defendant’s substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). “[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Error requiring reversal cannot be found if “a curative instruction could have alleviated any prejudicial effect.” *Callon*, 256 Mich App at 329-330. Issues of prosecutorial misconduct are decided “on a case-by-case basis by examining the record and evaluating the remarks in context[.]” *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). While the prosecution is free to argue the evidence and all reasonable inferences arising therefrom, the prosecution may not make a statement of fact to the jury that is unsupported by the evidence. *Callon*, 256 Mich App at 330.

There is no dispute that the prosecution inaccurately recalled the testimony of an investigator during closing argument. Specifically, in support of its assertion that defendant was moving around while shooting, rather than pinned against the truck, the prosecution recalled that an investigator had measured the distance between the bullet casings found on defendants’ property to be 40 to 50 feet. In actuality, the investigator testified that he located two bullet casings three to four feet apart from each other, and a third approximately 10 to 12 feet from the other two. Thus, while even the actual distance between the bullet casings may have supported the prosecution’s inference that defendant was not pinned against the pickup truck, his statement of fact was nonetheless unsupported by the evidence adduced at trial. However, a timely objection and cautionary instruction could have cured any possible prejudice from this misstatement. *Callon*, 256 Mich App at 329-330. Moreover, any prejudice resulting from the misstatement was in fact alleviated by the trial court’s instructions to the jury that the attorney’s statements are not evidence. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (jurors are presumed to follow the trial court’s instructions). No plain error requiring reversal exists.

Finally, defendant argues that he was denied the effective assistance of counsel by his trial counsel's failure to discredit a prosecution witness and to conduct any reasonable investigation of the case. Because defendant failed to move for a new trial or for a *Ginther* hearing, our review of this claim is again limited to errors apparent on the record. *Sabin (On Second Remand)*, 242 Mich App at 658-659.

Both of defendant's bases for ineffective assistance of counsel stem from his counsel's alleged failure to adequately discredit the testimony of defendant's friend, a prosecution witness who was charged as an accessory after the fact for his role in aiding defendant after the killing. Defendant asserts that the jury was entitled to hear information related to the witness's charge in order to properly assess credibility, and that defense counsel's failure to address the witness's self-interest could only be explained by his failure to adequately investigate the case. This argument fails for two reasons. First, through direct testimony and instructions, the jury was made aware of the witness's role in this case, including that he had been offered leniency in exchange for his testimony. Second, defense counsel questioned the witness during cross-examination regarding his role in this case, even going so far as to ask the witness what specific acts led to his being charged. Thus, defendant's claim that his counsel failed to ensure the jury was aware of the witness's self-interest in testifying lacks merit.

Moreover, to the extent defendant claims his counsel should have done more to discredit the witness, his argument is unavailing. Decisions regarding what evidence to present, including whether to raise issues related to the witness's health, and how to question witnesses, are presumed to be matters of trial strategy, which are not second-guessed on appeal. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defense counsel's failure to further discredit the witness's credibility constituted sound trial strategy. Defendant's theory of the case was self-defense. To that end, defense counsel spent considerable time eliciting facts from the witness, which tended to support that theory. For instance, defense counsel elicited (1) the witness's opinion that defendant was "real laid back" and rarely showed anger, (2) several instances of aggressive conduct on the part of the victim, and (3) details regarding what defendant had told him following the killing, specifically, that defendant had shot the victim during a physical altercation in which the victim hit defendant with the measuring wheel. In other words, while the witness testified for the prosecution, much of his testimony was in fact helpful to defendant. Any attempt to discredit the witness beyond merely drawing attention to his role in the case could have damaged defendant's defense inasmuch as it would have suggested to the jury that the witness was not telling the truth about what defendant told him. Defendant cannot overcome the "strong presumption" in this case that defense counsel's questioning of the witness was sound trial strategy. *Sabin (On Second Remand)*, 242 Mich App at 659.

Affirmed.

/s/ Donald S. Owens  
/s/ Christopher M. Murray  
/s/ Michael J. Riordan